

Proposed Changes to Rule 23

(Strikeouts indicate language in FRCP not proposed for adoption
in RCFC and highlights indicate proposed language unique to RCFC)

Rule 23. Class Actions

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(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is
sued as a representative of a class, the
court must—at an early practicable
time—determine by order whether to
certify the action as a class action.

(B) An order certifying a class
action must define the class and the class
claims, issues, or defenses, and must
appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1)
may be altered or amended before final
judgment.

(2)(A) **Not used.** ~~For any class
certified under Rule 23(b)(1) or (2), the
court may direct appropriate notice to the
class.~~

(B) For any class certified under
Rule 23(b)(3), the court must direct to
class members the best notice practicable
under the circumstances, including
individual notice to all members who can
be identified through reasonable effort.
The notice must concisely and clearly
state in plain, easily understood
language:

- the nature of the action,
- the definition of the class
certified,
- the class claims, issues, or
defenses,
- that a class member may enter
an appearance through counsel if
the member so desires,

- that the court will **include in**
~~exclude from~~ the class any
member who requests **inclusion**
~~exclusion~~, stating when and how
members may elect to be
included ~~excluded~~, and
- the binding effect of a class
judgment on class members
under Rule 23(c)(3).

(3) ~~The judgment in an action
maintained as a class action under
subdivision (b)(1) or (b)(2), whether or
not favorable to the class, shall include
and describe those whom the court finds
to be members of the class.~~ The
judgment in an action maintained as a
class action under subdivision (b)(3),
whether or not favorable to the class,
shall include and specify or describe
those to whom the notice provided in
subdivision (c)(2) was directed, ~~and who
have not requested exclusion~~, and whom
the court finds to be members of the
class.

(4) When appropriate (A) an
action may be brought or maintained as
a class action with respect to particular
issues, or (B) a class may be divided into
subclasses and each subclass treated as a
class, and the provisions of this rule shall
then be construed and applied
accordingly.

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(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve
any settlement, voluntary dismissal, or
compromise of the claims, issues, or
defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) ~~Not used. In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.~~

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

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(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and

adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant

seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows: See Rule 54(d).

(1) Not used. ~~Motion for Award of Attorney Fees.~~ A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Not used. ~~Objections to Motion.~~ A class member, or a party from whom payment is sought, may object to the motion.

(3) Not used. ~~Hearing and Findings.~~ The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Not used. ~~The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).~~

Rules Committee Notes

2002 Revision

RCFC 23 was completely rewritten. Although the court's rule is modeled largely on the comparable federal rule, there are significant

differences between the two rules. In the main, the court's rule adopts the criteria for certifying and maintaining a class action as set forth in *Quinault Allottee Ass'n v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).

Because the relief available in this court is generally confined to individual money claims against the United States, the situations justifying the use of a class action are correspondingly narrower than those addressed in FRCP 23. Thus, the court's rule does not accommodate, *inter alia*, the factual situations redressable through declaratory and injunctive relief contemplated under FRCP 23(b)(1), (2).

Additionally, unlike the federal rule, the court's rule contemplates only opt-in class certifications, not opt-out classes. The latter were viewed as inappropriate here because of the need for specificity in money judgments against the United States, and the fact that the court's injunctive powers – the typical focus of an opt-out class – are more limited than those of a district court.

Finally, the court's rule does not contain a provision comparable to FRCP 23(f). That subdivision, which provides that a "court of appeals may in its discretion permit an appeal from an order . . . granting or denying class certification" has its origin in 28 U.S.C. § 1292(e), which authorizes the Supreme Court to promulgate rules that provide for an appeal of an interlocutory decision other than those set out in Section 1292. Because no comparable statutory authority exists for this court's promulgation of a similar rule, subdivision (f) was omitted. It should be noted, however, that the Court of Federal Claims may certify questions to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. §§ 1292(b) and 1295.

2004 Amendment

In addition to the rule changes introduced in 2002, the text of the present rule also incorporates the revisions to FRCP 23 effective December 1, 2003. These revisions, which appear as subdivisions (c), (e), (g), and (h) of the rule, adopt the text of the federal rule except where modification in wording was necessary to

accommodate the “opt-in” character of this court’s class action practice.

Proposed Changes to Rule 53

(Strikeouts indicate language in FRCP not proposed for adoption in RCFC and highlights indicate proposed language unique to RCFC)

Rule 53. Masters

(a) Appointment.

(1) Unless a statute provides otherwise, ~~the chief judge, at the request of the presiding judge, a court~~ may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the ~~presiding judge court without a jury~~ if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by ~~the presiding an available district judge or magistrate judge of the district.~~

(2) A master must not have a relationship to the parties, counsel, action, or ~~presiding judge court~~ that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In ~~requesting the appointment of~~ appointing a master, the ~~presiding judge court~~ must consider the fairness of imposing the likely expenses

on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master.

(1) **Notice.** The ~~presiding judge court~~ must give the parties notice and an opportunity to be heard before ~~appointing~~ a master ~~is appointed~~. A party may suggest ~~to the presiding judge~~ candidates for appointment.

(2) **Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances—if any—in which the master may communicate ex parte with the ~~presiding judge court~~ or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) **Entry of Order.** The ~~presiding judge court~~ may ~~request an enter the~~ order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §

455 and, if a ground for disqualification is disclosed, after the parties have consented with the presiding judge's court's approval to waive the disqualification.

(4) Amendment. The order appointing a master may be amended by the chief judge at any time upon the recommendation of the presiding judge. The presiding judge may make such a recommendation at any time after the presiding judge has given after notice to the parties and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the presiding judge appointing court to compel, take, and record evidence.

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports. A master must report to the presiding judge court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the presiding judge court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.

(1) Action. In acting on a master's order, report, or recommendations, the presiding judge court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly

or partly reject or reverse; or resubmit to the master with instructions.

(2) Time To Object or Move.

A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the presiding judge court sets a different time.

(3) Fact Findings. The presiding judge court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the presiding judge's court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions. The presiding judge court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the presiding judge court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation.

(1) Fixing Compensation. The presiding judge court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court The chief judge, upon the recommendation of the presiding judge, may set a new basis and terms. The presiding judge may make such a recommendation after the presiding judge has given after notice to the parties and an opportunity to be heard.

(2) Payment. The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or other subject matter of the action within the presiding judge's court's control.

(3) Allocation. The presiding judge court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) Not used. Appointment of Magistrate Judge. ~~A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.~~

and presiding judge is carried through into the subdivisions of the rule where the words "presiding judge" are substituted for the word "court." The added language addresses the fact that pursuant to 28 U.S.C. § 798(c), the court's authority to appoint special masters to assist the court in carrying out its functions rests exclusively with the chief judge.

Rules Committee Notes

2002 Revision

The text of Rule 53 as revised on May 1, 2002, and its accompanying Rules Committee Note, may be found at 51 Fed. Cl. LXXXV (2002) or in Westlaw, database USCA03, search CI(RCFC & 53).

2004 Amendment

Rule 53 adopts the significantly revised text of FRCP 53, effective December 1, 2003, with minor adjustments in language reflecting differences in jurisdiction between this court and the district courts. The principal adjustments in language occur in the introductory text of subdivision (a) which adds the words "the chief judge, at the request of the presiding judge" as an additional qualification to the appointment of a master and in related changes in subdivisions (b)(1), (4) and (h)(1). The distinction between the roles of chief judge

Current Rule 54

(Proposed change shown by strikeout)

VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form. “Judgment” as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Costs other than attorneys' fees may be awarded to the

prevailing party to the extent permitted by law. See 28 U.S.C. § 2412(a).

(A) Filing Bill of Costs.

A prevailing party may request the clerk to tax allowable costs by filing a Bill of Costs as set forth in the Appendix of Forms (Form 4) within 30 days after the date of final judgment, as defined in 28 U.S.C. § 2412(d)(2)(G). In any case where any costs other than the fee for filing the action are being requested, the bill of costs shall be supported by affidavit and accompanied by a memorandum setting forth the grounds and authorities supporting the request. Any vouchers, receipts or invoices supporting the cost being requested shall be attached as exhibits.

(B) Objections to Bill of

Costs. (i) An adverse party may object to the Bill of Costs or to any item claimed therein by filing objections within 28 days after the service of the Bill of Costs. Within 7 days after service of the objections, the prevailing party may file a reply. Unless a conference is scheduled by the clerk, the taxation of costs or any disallowance will be made by the clerk on the record. (ii) A party may request the court to review the clerk's action by filing a motion within 14 days after action by the clerk. The court's review of the clerk's action will be made on the

existing record unless otherwise ordered.

(C) Costs in Settlements. The clerk will not tax costs on any action terminated by settlement wherein the judgment is entered pursuant to RCFC 68 or is dismissed pursuant to RCFC 41(a). Settlement agreements must resolve any issue relating to costs. In the absence of special agreement, parties will bear their own costs.

(D) No Extensions. No extensions of time under this rule will be permitted and the failure of a prevailing party to timely file a Bill of Costs shall constitute a waiver of any claim for costs.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. See Appendix of Forms, Form 5.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 30 days after the date of final judgment, as defined in 28 U.S.C. § 2412(d)(2)(G); must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the

services for which claim is made.

(C) The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in RCFC 52(a).

(D) The responding party shall have 28 days from the service of the motion pursuant to subdivision (d)(2)(A) to file a response, to which plaintiff may reply within 14 days after service of the response. After the filing of a motion, and response and reply, if any, the judge will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate. ~~In addition, the court may refer issues relating to the value of services to a special master under RCFC 53 without regard to the provisions of subdivision (b) thereof.~~

(E) The provisions of subdivisions (d)(2) (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. §1927.

Rules Committee Notes

2002 Revision

RCFC 54(d) was revised in several respects. The subdivision was modified to conform its structure to FRCP 54(d). In addition, the subdivision, as re-written, departs from its FRCP counterpart in several respects:

First, because the allowance of attorneys' fees and costs in this court is almost always determined under the provisions of 28 U.S.C. § 2412 (a), (d) (the Equal Access to Justice Act), it was deemed advisable to reflect this fact in paragraph (d)(2) rather than to retain the broader, but potentially misleading, language that appears in FRCP 54(d)(1). *See Neal & Co. v. United States*, 121 F.3d 683 (Fed. Cir. 1997).

Second, Subdivision (d)(1) was enlarged beyond the scope of its FRCP counterpart by the incorporation of RCFC 77.4 ("Taxation of Costs").

Third, Subdivision (d)(2) brings together relevant sections of its FRCP counterpart and former RCFC 81(e) ("Application for Attorneys' Fees").

Finally, the time periods for objecting to a Bill of Costs and for requesting review of the clerk's action are enlarged.

2004 Amendment

The final sentence of Rule 54(d)(2)(D) was deleted in conformance with Rule 53(a)(1).